Richmond Public Interest Law Review

Volume 8 | Issue 1 Article 5

1-1-2004

Brief

E. Brandon Bailey

Brief

E. Brandon Bailey[1]

Appellants contend that the Fourteenth Amendment protects marriage as a fundamental right of all persons, regardless of sexual orientation. Therefore, appellants contend that Section 411, under which the clerk of Declaration County circuit court acted in denying appellants' request for a marriage license, must be unconstitutional. Appellants predicate their contentions on *Lawrence v. Texas*.[2] Unfortunately for appellants, the holdings of *Lawrence* are too weak a wind to shift the ship of marriage from its historical and legal course. To understand why *Lawrence* is inadequate for the purpose for which appellants invoke it, the Court must look to the right of marriage as it existed prior to *Lawrence*, and then decide whether the holdings of *Lawrence* stretch that right to encompass same-sex relationships.

"[T]he right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[3] However, marriage inheres a relationship between a man and a woman. There is no evidence anywhere in the body of Anglo-American jurisprudence to support the allegation that the notion of marriage ever extended to same-sex relationships. On the contrary, there is ample case law supporting the finding that marriage applies only to opposite-sex relationships.[4] The Constitution, in confirming this right in all persons, did not unwind its very meaning. A marriage must comprise two members of the opposite sex. The constitutional right of marriage allows a man and a woman to enter into matrimony.

While the right to marry is implicit in the Fourteenth Amendment, the State may restrict the parties who may and may not avail themselves of the right, "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."[5] The State has the power to restrict those parties who may enter into marriage and to define those conditions by which a marriage can be dissolved.[6] If it is within the power of the State to deny the right of marriage to, for example, the incompetent, even where the two interested parties are of the opposite-sex, it seems axiomatic that the State is free from an obligation to extend the right of marriage to two same-sex parties, whose matrimony would alter the very definition of marriage.

To be sure, the power of the State to regulate marriage is not unchecked. In *Loving v. Virginia*,[7] the United States Supreme Court held that the State could not deny the right of

---

[1] E. Brandon Bailey is a rising second-year law student at the University of Richmond T.C. Williams School of Law, Richmond, Virginia; B.A. International Studies, University of Richmond 1998.
[2] 123 S.Ct. 2472 (2003).
[3] Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
[4] *See generally* Robin Cheryl Miller, Annotation, *Marriage Between Persons of Same Sex*, 81 A.L.R. 5TH FED. 1 (2000) (collecting court rejections of claimed rights to same-sex marriages grounded on the First, Fifth, Eighth, Ninth, and Fourteenth Amendments).
[5] Maynard v. Hill, 125 U.S. 190, 205 (1887).
[6] *Id.*
[7] 388 U.S. 1 (1967).

marriage to interracial couples.[8] *Loving*, while rightly holding that the prohibition of marriage between parties of different races was abhorrent to the Equal Protection Clause, still recognized that "marriage is a social relation subject to the State's police power."[9] The Court's destruction of the State's tools to deny marriage to opposite-sex parties of different races does not paint with so broad a brush as to obscure either the traditional notion of marriage as an institution between a man and a woman or the clear power of the State to determine who, within its jurisdiction, is competent to join in that institution.

Scientific and medical advancements have clouded the once-clear definition of marriage to the extent that some advancements have blurred the lines between the sexes. It is now medically possible to transform the male genitalia into the female and vice versa. However, the law is not ignorant of this evolution. In *In re Estate of Gardiner*[10] and *Littleton v. Prange*,[11] the state courts of Kansas and Texas, respectively, held that the medical alteration of the physical characteristics of a genetic male do not create a female for the purposes of establishing an opposite-sex relationship suitable for the institution of marriage.[12] A vaginaed male is still a male, and his relationship with another male remains a same-sex relationship. Both the *Gardiner* and the *Littleton* courts relied on the genetic sexual identity of the transsexual party.[13]

Gardiner and *Littleton* do appear to create a conundrum in the right of marriage: If a vaginaed male is still a male, he may marry a woman, giving rise to the appearance of a same-sex relationship encompassed by marriage. However, the appearance is deceptive. The vaginaed male is still a male. The relationship is still opposite-sex. The situation is identical in the case of a penised female in a relationship with a male. The relationship is still opposite-sex. Opposite-sex relationships are compatible with the definition of marriage.

Gardiner and *Littleton* further illustrate that the denial of a marriage license to two same-sex parties is not opprobrious of homosexual sexual activity. Indeed, both the vaginaed male and his spouse and the penised female and her spouse are likely to engage in what would be described as homosexual physical intimacy. The fact that these relationships are not excluded by the definition of marriage in the eyes of the law repudiates allegations that the inapplicability of the right of marriage to same-sex couples reflects a moral condemnation of homosexual sexual activity.

No law, then, existed prior to *Lawrence* to establish a same-sex right of marriage. The question to which the Court must now turn is whether *Lawrence* has established such a right.

The majority opinion of *Lawrence* extended the constitutional right to privacy to encompass the private, consensual, non-commercial sexual activity of two adults of the same sex.[14] The statute underlying *Lawrence* criminalized the behavior of one class of persons where

[8] *Id.* at 12.
[9] *Id.* at 1.
[10] 42 P.3d 120 (Kan. 2002).
[11] 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).
[12] *Gardiner*, 42 P.3d at 135-37; *Littleton*, 9S.W.3d at 231.
[13] *Gardiner*, 42 P.3d at 135; *Littleton*, 9S.W.3d at 231.
[14] *Lawrence*, 123 S. Ct. at 2484.

identical behavior in another class was not similarly criminalized.[15] The Court rightly affirmed the holding of *Romer v. Evans*,[16] which rejected the deprivation of equal protection under the law to a class of persons based solely on animosity towards the class.[17]

However, denying same-sex couples a marriage license does not in itself deprive them of equal protection. As previously established, the denial of a marriage license is not an assault on homosexual physical intimacy. The prohibition against same-sex marriage is not driven by animus, but by the traditional and enduring definition of marriage itself. Indeed, partners in same-sex couples may marry, provided they marry persons of the opposite sex. In fact, the continuation of the same-sex relationship outside the context of their marriages may not be considered adulterous.[18]

Furthermore, the Court could not have been clearer that its holdings in *Lawrence* did not extend Fourteenth Amendment protections to include same-sex marriage, when it stated that "[*Lawrence*] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[19] While the Court states that even liberty interests without a historical tradition—as same-sex marriage is alleged to be—are protected from State regulation in the absence of legitimate State interest,[20] Justice O'Connor, in joining the Court's judgment, recognized that rational bases remain which justify the State's interest in regulating marriage even to the exclusion of same-sex couples.[21]

A same-sex couple may find the right to marry members of the opposite sex an empty right, a repugnant trivialization of the depth of their same-sex relationship and the emotional and physical bonds which underpin it. However, that is the extent of the right afforded them under the Constitution, and they have the choice to claim it or forebear it. There is no weight of law or history that affords them a greater right, and the majority and concurring opinions of *Lawrence* are unequivocal in their denial of the notion that *Lawrence* extends the right of marriage to same-sex relationships.

The conclusion that there is no right of same-sex marriage is not dispositive, however. Section 411 goes further than denying the right of marriage to same-sex couples. Section 411 also deprives same-sex couples of the benefits of marriage. Because same-sex couples cannot marry and thereby acquire the benefits typically reserved for married, opposite-sex couples, the Court must consider whether the explicit denial of those benefits constitutes a violation of the Equal Protection Clause.

---

[15] Tex. Penal Code Ann. § 21.06(a) (2003).
[16] 517 U.S. 620 (1996).
[17] *Lawrence*, 123 S. Ct. at 2482 (citing *Romer*, 517 U.S. at 634).
[18] *See In re* Blanchflower, 834 A.2d 1010 (2003) (holding that homosexual activity did not constitute sexual intercourse for statutory definition of adultery).
[19] *Lawrence*, 123 S.Ct. at 2484.
[20] *Id.* at 2492 n.3.
[21] *Id.* at 2487-88 (O'Connor, J., concurring).

The benefits of marriage are myriad. The long litany may include access to an injured or infirm partner under hospital visitation rules, favorable tax treatment, domestic abuse protections, judicial assignment of custodial rights of children (presumably children by adoption in the case of same-sex couples, but possibly also children of a prior, opposite-sex relationship), spousal immunity privileges, an insurable interest for life insurance, and standing to sue for wrongful death.

While many benefits of marriage fall short of rights protected from infringement by the State, some may be construed to be protected by the Fourteenth Amendment. For example, a domestic abuse statute that so narrowly defines domestic abuse as to exclude violence within the context of a same-sex relationship may run afoul of the Equal Protection Clause. The Independence statutes on domestic abuse and protective orders are not in the record of the trial court. However, the difficulty of identifying each and every benefit of marriage, analyzing it to determine whether it reflects a constitutionally protected right, and ascertaining whether that right would be otherwise unavailable to same-sex couples who may not avail themselves of the right because they may not marry, may prove insurmountable. Fortunately, this task may be moot.

While no right to marry exists for same-sex couples under the Fourteenth Amendment, no prohibition against same-sex marriage exists in the Constitution. If a sister State were to allow same-sex marriage under its right to regulate marriage under *Maynard*, and a same-sex couple were to enter Independence, whether in transit, as visitors, or intending residence, Section 411 would deny that couple, legally married elsewhere, the benefits of marriage in Independence. It is in this connection that Section 411 proves most odious, for it would deny the benefits of marriage to same-sex couples legally married in other States while affording those benefits of marriage to opposite-sex couples legally married in other States.

Consequently, Section 411 must necessarily create different classes of persons legally married and discriminate against one class. There appears to be no rational basis for this discrimination. The State's interest in "preserving the traditional institution of marriage"[22] only allows it to exclude same-sex couples from marrying within its jurisdiction. The State's interest does not allow it reach into the jurisdictions of sister States and define what marriage is or ought to be there. Failing a rational basis for the disparity in treatment between same-sex and opposite-sex couples married in other States and who migrate to Independence, the "benefits of marriage" clause of Section 411 creates a solitary class—same-sex couples married outside of Independence—and denies them equal protection of the law. Denying a class equal protection of the law without a rational basis is a violation of the Fourteenth Amendment.[23]

Furthermore, the extension of the benefits of marriage to same-sex couples legally married elsewhere and unmarried same-sex couples creates a new inequality. While it may appear that no greater inequality would exist between married and unmarried same-sex couples as already exists between married and unmarried opposite-sex couples, this appearance is illusory. Unmarried opposite-sex couples need not leave Independence to marry and thereby avail themselves of the benefits of marriage in a way that same-sex couples cannot. The only

[22] *Lawrence*, 123 S. Ct. at 2488.
[23] *Lawrence*, 123 S. Ct. at 2482.

apparent cure for this inequality is that, where a State invokes its right to regulate marriage to exclude same-sex couples, on the rational basis of preserving the traditional institution of marriage, the State must provide some alternative to marriage by which any remaining civil benefits of marriage, if any, may be acquired.

While the State of Independence does have the right to regulate marriage within the scope of the Constitution, and while no right to same-sex marriage exists under the Fourteenth Amendment, before or after *Lawrence*, Independence may not deprive same-sex couples of their equal protection. By denying legally married same-sex couples the benefits of marriage afforded married opposite-sex couples, Section 411 denies same-sex couples their equal protection and cannot stand. While some may argue that the simplest mechanism by which the State may fulfill its equal protection obligations is to extend the right of marriage to same-sex couples, States are not obliged to do so and that decision lies with the legislature and not with the courts. Provided that the State does fulfill its equal protection obligations, the mechanism by which it does so is within its own discretion.